

Cross-Examining the Child Witness

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That moment in the trial has come. The lawyers, the judge, and the jury are all waiting for the most important witness to enter the room and take the stand. The one witness a lawyer dreads to face, the child witness, enters the room and sits down in the witness chair. With a combination of careful planning, thought and intuition, this cross-examination, often a pivotal point in the trial, will neutralize the prosecution and strengthen the jury's doubt in the case.

Problems are only opportunities in work clothes.
Henry J. Kaiser

Defense lawyers understand better than anyone that the presumption of innocence will fall on deaf ears if the lawyer can't answer one simple question. "Why would she say that if it didn't happen?" Contrary to what the prosecution may assert in many cases, the question is not, "Why would she lie?". The defense, if possible, should avoid painting the child witness as a liar unless the child is mature enough so that the jury can envision her having her own motivation to lie about a sexual assault.

The key to developing a successful defense in a sexual case involving a child is to fully understand the following elements of the case; the age and development of the child, the family dynamics, and the circumstances and content of the disclosure(s). Within those features of the case, a defense lawyer will almost always be able to find a compelling defense narrative.

Before the lawyer attempts to understand the child in question, it is important to understand something about children in general. If the lawyer has children or has raised children, he or she will have an advantage. Chances are that the parents have watched their own children grow and develop, make mistakes, lie, make excuses, interact with other children and adults and react to challenges in their lives. Generally, these parents will also have been the fly on the wall during play dates, car pools, playground duty and school dances and had a chance to watch children, not their own, interact with adults and peers. These real life experiences are invaluable because the child witness in the case will be similar in many ways to the children in the lawyer's life. The lawyer will likely be facing challenges with his or her witness and understanding how to get and maintain respect and cooperation from children will help the lawyer in court.

When seeking to understand the child witness in a given case, a lawyer should evaluate the following areas to develop a meaningful defense and effective cross-examination; age, gender, development, personality, verbal skills, intelligence and experience.

“A person’s a person, no matter how small.”

Dr. Seuss

Pre-school Child

Pre-school aged children, between the ages of three to five, are usually the youngest children to testify in a trial and pose the greatest challenge because of their limited vocabulary, lack of understanding of abstract concepts and immaturity. On the other hand, the young child’s vivid imagination and belief in “other worldly” things may be helpful to the defense. A good understanding of the child’s limited experience can guide the lawyer to an appropriate and helpful cross-examination.

At this age, children are highly imaginative, have empathy for others, and like to emulate and please adults. Young children often have difficulty with concepts such as time, over/under, inside/outside, colors and places. Forensic interviewers, who should be carefully evaluating the child’s understanding of all those concepts to ensure that they get reliable information about the alleged offense, often rush through the evaluation questions to get to the meat of the interview. Then when the interviewer wants to know whether something happened “under” or “over” the clothes or “inside” the body, the child’s statements may mean little unless the interviewer has established that the child knows what these concepts mean. This will be primarily fodder for the cross of the interviewer and direct of the defense expert. However, it is also important for the lawyer to understand the limitations of the child for purposes of the examination. However, a poorly done interview may not reveal much about the child’s competency in areas that are important to the defense. That’s when knowing what can generally be expected at various ages may come in handy. One should, however, be cautious about trying to demonstrate the child’s competence in areas such as time and place in court because the child may have learned more about the concepts during the sometimes lengthy period between the forensic interview and the trial.

Think about the boundaries of a child’s world at that age. If child’s world is seen in concentric circles, this age is the smallest. Her world is her immediate family, extended family and possibly daycare, pre-school and kindergarten. A child this age will not tend to have independent motives to lie about someone although hearing negative opinions about an adult can affect her willingness to believe or repeat something bad about the adult. At this age the accusation often arises because of the manipulation or misunderstanding of an adult. A malicious adult can implant a false memory of abuse in a child so convincingly that the

child will repeat it with every appearance of sincerity. But the well meaning adult who misunderstands a small child's complaint of pain, sexual behaviors or use of a sexually charged word may be just as dangerous.

A well-meaning adult who honestly, but mistakenly, believes that a child has been molested can easily implant a false memory inadvertently. The ability to implant a false memory or create misinformation about a real memory has been studied and researched for many years, notably by Elizabeth Loftus, but there are many other resources available. One of Dr. Loftus' articles outlining some of her research can be found here. <https://faculty.washington.edu/eloftus/Articles/sciam.htm>. A defense in such a case might arise when the child says something ambiguous that an adult misinterprets. "Papa hurt me down there." An untrained or hyper vigilant adult may assume without foundation that the child has been assaulted. Subsequent questioning by that adults or other untrained adults may result in a false memory that the child will recite with utter conviction. Understanding the family dynamics and the circumstances and exact wording of every "disclosure" can help the lawyer find the origin of the accusation. In cases involving an adult's misunderstanding or manipulation of the child, the focus of the cross-examination will be on the adults, the child's relationship with them, their relationship with each other and the child's knowledge of those dynamics.

In this developmental age range, the lawyer should use very simple concepts and short words and sentences in cross-examination. If the defense is that a child with a history of urinary tract infections has an unfortunately painful, but innocent, injury during a diaper change, one might ask the child about how sometimes her bottom hurts or she doesn't like having her diaper changed or wiping hurts her. If the defense is about a manipulative spouse, then one could ask about how Daddy used to live there but doesn't anymore or about how Daddy and Mommy argue. Children, even small ones, observe more than adults think. While they may not process the adult emotions fully, they know something is wrong and can talk about it.

If the child has been rehearsed and sounds like it, it is better to demonstrate that fact without forcing the jury to hear the sexual details again. Generally speaking, while the sexual matters are key to the prosecution narrative, they rarely help the defense, tend to upset the witness and remove the attention from the point you want to make about the manipulation. If possible one should find other parts of the story that sound rehearsed and use those to make the point. It may also become apparent during the recorded interview that the child adopted suggestions when the forensic interviewer provided words or concepts that the child had not used. In addition to pointing that out during the cross-examination of the interviewer, the lawyer could consider introducing words or concepts during cross examination that the child had not previously used in hopes of demonstrating how the child adopting the lawyer's suggestion. Some children will readily accept the suggestions of adults in authority but others will not. Using the resources in the case file should help the lawyer to determine the level of

suggestibility of the young complainant.

There's something in this country that is so opposed to understanding the complexity of children.

Maurice Sendak

Elementary School Child

When a child witness reaches elementary school age, he or she will have different capabilities than the pre-school child. The witness will understand more of what the lawyer is asking and it is possible to introduce more complicated topics. Defenses related to manipulation by a malicious adult will still be available and it may still be possible for a misunderstanding by a well-meaning adult to arise. The child has entered a more formal school setting and should be able to sit still for the examinations and respond to authority. Maintaining a calm, pleasant and business-like demeanor is effective with children this age. The lawyer should avoid overly solicitous comments and soft vocal tones. It is not necessary and simply highlights the vulnerability of the witness. The examination should be approached as if it a task or job that needs to be finished just as other tasks in a child's life must be finished before they can do what they want.

That being said, the lawyer should also keep a close eye on the witness and watch for clues to suggest that the witness is getting tired. There is nothing wrong with asking the witness if she is tired and would like to take a short break as long as it is done in a business-like way. It is okay to say, "You look a little tired and we have more work to do. Would you like to take a break?" Young children may cry and have trouble managing emotions when they are tired. Fatigue, and not necessarily the stress of the topic, can cause tears. Maintaining a sense of the child's emotional and physical state may help the examination to go more smoothly.

Children at this age are also exposed to a wider range of adults and influences. The lawyer should attempt to learn pre-trial about the witness' most important relationships and see how they may impact the child. Is there a new step-father that the child is trying to protect by accusing your client, her uncle? Is there a friend or other young family member who has been assaulted? This may provide a motive for the child to make a similar accusation to get attention.

The child's school world may also provide the fuel and motivation to make a false accusation. Has the child be watching "stranger-danger" videos at school and getting the idea that children who accuse adults of sexual abuse are heroes? Some children seeking attention from absent parents or beloved teachers may say something that isn't true. Understanding the curriculum and the relationships may provide the key. During cross-examination, the lawyer may consider asking the child to tell the story of the video to set the stage for the defense.

Many children may not understand the possible consequences of the accusation because the consequences to the adult is rarely explained to them.

At this age, the witness, who is now more sophisticated in the use of tablets, smart phones and computers, may have easy access to inappropriate material which will answer the question about where the child learned about sex. Children are discovering on-line pornography, often initially by accident, at increasingly early ages. Even young children may be inadvertently exposed to sexual materials on the internet or popular media and attempt to emulate what they see. Thus, while the child may demonstrate or talk about sexual behavior in a way that shows knowledge of adult sexual behavior, that does not mean that the child learned by direct experience. The lawyer may discover important facts about the witness' access to digital material from talking to the client's family or other witnesses about the child's unsupervised free time on digital devices, streaming shows and even gaming devices with access to the internet. Many families don't set up their parental controls and by puberty most tech savvy kids can bypass them. With the right foundation, asking the child about unsupervised access to these digital outlets may help you answer the juror's unspoken concern about where the child learned about sexual behavior.

Children in elementary school, who are developing leadership qualities, may be able to influence other children, leading to multiple accusation by related or closely connected children. The lawyer will need to examine the dynamics between the children carefully in these cases. The disclosure of abuse by one may lead to an accusation by another child if the second child witnesses favorable behavior after the first child reveals abuse. In some cases, the first accusation may be true but the second may not. In cross-examination, the lawyer may ask the child about those relationships, how often they are together, how important the friendship is, does the child look up to her friend and other questions to draw a picture of their relationship. Explore how the child learned of the allegations, what she heard, what kind of positive attention the first complainant received after "disclosing" and other possible motivation behind the second allegation. Highlight how often the children were together so that they could get their stories straight. It is important to keep an open mind even when the facts seem bleak, because there may be an alternative to the prosecutor's theory.

"I've never run into a person who yearns for their middle school days."

Jeff Kinney

Middle School

By middle school the child is experiencing puberty and may have sexual feelings or crushes on adults. Friends are becoming paramount, a dynamic that only accelerates in high school. From this age, children are increasingly self-conscious and unwilling to look bad in front of other kids. A defense lawyer should also understand that children will tell other children things with the absolute belief that the story will go no further. This makes it

possible for the child to exaggerate or even lie thinking that it will go no further. The problem is that it often does. Sadly, once a child has committed to a story, she will not back down in most cases for fear of what people will think. Also, children, even teenagers, may hold the false belief that nothing much will happen to the adult or other child because the public service AV materials that schools use may talk about the perpetrator having to undergo counseling but rarely mention prison or any of the host of consequences that the defendant and his hapless family will suffer. Children may well think that the story is harmless until it is too late to back down.

At this age, the child may still be manipulated emotionally or psychologically to believe an accusation drummed up by a malicious adult. When the theory is that someone else in the family is pushing the accusation, examining the child about her relationship with the adults, often parents or step-parents, and her knowledge of their relationship to each other may be a good place to start and set the scene. The circumstances surrounding the “outcry” may also prove fruitful. Often, an accusation comes on the heels of conflict with a parent or between the parents. Sometimes, the motivation is more personal, such as issues at school or at home, creating a fear of discipline or consequences and may cause the child to attempt to deflect attention from the bad behavior. Asking about the problems at home or school can highlight the motivation to lie. The child may claim that she has been sexually abused privately to a friend, who is a sexual assault victim, in an attempt to be closer. Talking to that child about the close relationship she has with the other child may be the place to start. The child may resent a new step-parent or significant other and make the allegation to drive them away. Asking about these issues will shift the focus from the alleged sexual acts to the underlying motivation for the false accusation.

All advocacy is, at its core, an exercise in empathy.
Samantha Power

Tips for Preparing for All Ages

The tape of the forensic interview is a key tool for a successful cross-examination and should be watched a number of times in preparation. This should be done in stages. First, the child’s statement should be reviewed for content and compared with other statements the child has made to others about the allegations. The usual evaluation of internal and external inconsistencies, the statement’s reasonableness and its reasonableness in light of the physical evidence should be conducted. Then the lawyer should evaluate whether the interviewer followed appropriate child interview protocol or used improper and suggestive interviewing techniques to provide fodder for the cross-exam of the interviewer and to see the points at which the interviewer could have or did influence the child’s memory. Finally, the lawyer can use the interview to evaluate the child’s verbal abilities, personality, interests, relationships, which are often revealed in the opening narratives and rapport building stages. It is easy to miss important intangible details if you skim through those stages.

The recorded interview will reveal the child's strengths and limitations and help you assess her ability to cope with and understand the examination. Every child is different and may have challenges that will impact your case. For example, a child with a speech impediment may be difficult to understand. Unless the lawyer listens carefully and repeatedly to the forensic interview and learns the child's speech characteristics, the lawyer may find himself asking the witness to repeat her answer over and over, risking a loss of momentum. The recorded interview will also provide important clues about the child's personality and her likely presentation in court. For example, a child who is shy and clutching the arms of the chair in the interview will have to be watched like a hawk during the questioning to make sure she does not freeze, cry or become unable to continue the examination. If the child is getting upset, it is important to maintain a calm, pleasant and business-like demeanor. When the lawyer sees concerning signs, that is a great time to change the topic, distract the child with an unexpected off-topic question, or in the right situation, offer the child a break. If the child witness is highly distracted or fidgety the lawyer can use the same techniques teachers use in class. Say the child's name firmly if she begins to lose focus and when re-focused remind her of the question or topic. "We were talking about when Dad moved out." It may help to move closer to the witness to help her stay centered on the lawyer and the task at hand.

Using the courtroom effectively may also help prevent coaching. If, the witness' family is allowed to remain in the room during the child's testimony and the lawyer has concerns that the family will attempt to coach the witness, the lawyer can consider changing position in the courtroom to make it more obvious if the child begins to look to the adult for cues. One can either attempt to block the view to the interested adult forcing the child to crane her neck to see them or move to the opposite area of the courtroom so the child has to look away from the lawyer to see the adult. Either way, the lawyer and the jury will notice if the child stumbles and begins looking to the adult for the answer. Consider also approaching the witness to create a more intimate one on one conversation if that seems more appropriate. Finally, the lawyer should make sure someone in the courtroom is watching and will notify the lawyer if anyone attempts to coach the witness.

A picture is worth a thousand words. The lawyer should insist that the client provide her with pictures and video of family events during relevant time periods. Use those pictures during cross-examination to show that the child showed no sign of trauma during relevant time periods and appeared to have a good relationship with your client. Counsel may consider showing the child the pictures and have them describe the party, outing or special moment it shows. Hearing the child describe happy occasions with the client may help the jury to see a different side of your client and his relationship with the witness. These pictures may also provide a soft impeachment of the witness. For example, if the witness testifies on direct that she never wanted to be around the accused after the abuse, there are probably pictures that would give reason to doubt that statement. It may be hard for the witness to explain why she was hugging the client with such a happy expression if she was so fearful

or angry. The jury will get the point.

The State's narrative is generally centered on the shocking allegations of sexual conduct. The defense narrative is more likely centered on the child's motivations (remember some of them are adolescents), the motivations of the adults in their lives and the suggestiveness of the questions posed to the child by family, friends and interviewers.

Be business-like and pleasant, possibly like a teacher who won't take any nonsense but is also relatable. If the child looks as if she is ready to cry, say her name, get her attention and switch to a different subject until she is on a more even keel. You can circle back to the topic if needed.

Children respond positively to leading and declarative questions. Use of open ended questions are usually problematic and lead to extraneous, or worse, inculpatory details. Focused, short, declarative questions also help you tell the narrative and focus the jury's attention on what you think is important. This may result in a good outcome in your case as the limited research demonstrates.

Attorneys' Questions and Children's Productivity in Child Sexual Abuse Criminal Trials, Appl Cogn Psychol. 2014 ; 28(5): 780–788. doi:10.1002/acp.3048., J. Zoe Klemfuss, Jodi A. Quas, and Thomas D. Lyon. <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4390047/>

“Finally, what attorneys say while questioning children in court matters, here, seemingly more so than children's responses. While children's responses were neither directly nor indirectly related to case outcome, attorneys' questions were. Furthermore, attorney questioning was predictive of response productivity, while children's productivity was not predictive of attorney questioning. Together, our findings suggest that juries may be more sensitive to information provided by attorneys (both in statements and in questions to children) than to information provided by children when making case decisions and that attorney questions were not reflective of children's in-court performance. Cases that ended in acquittals were characterized by lower rates of option-posing questions and higher rates of suggestive questions by defense attorneys out of all the questions posed to the child. The same was true for prosecutor question rates in cases ending in convictions. There were no differences by case outcome when each attorney's questioning was considered separately. Thus, perhaps attorneys need not be concerned about whether jurors perceive them as leading the witness. When they increased their use of suggestive questions more than did the opposing counsel, the case was more likely to end in a favorable outcome. When both attorneys similarly scaled their use of suggestive questions, there was no impact on case outcomes. Suggestive questions may allow the attorneys to best present their case. This finding is disturbing given that suggestive questions led to the most minimal responding and have been consistently shown to cause inaccurate responding, particularly in children (e.g.

Ceci & Bruck, 1993). Future work should further explore why this trend emerged in the current study, particularly given the small number of cases.

Together, the findings demonstrate key differences between prosecutors and defense attorneys, as well as age-related differences in questioning that might be expected to influence children's responding. The findings also suggest that variations in attorney questioning relate to whether attorneys achieve their desired case outcomes."

The only real valuable thing is intuition.

Albert Einstein

There is no perfection in trial advocacy. Every lawyer and witness brings to the courtroom their own life experiences and baggage. The key to a successful cross-examination is understanding children, understanding this child and understanding the personal dynamics of her life. Finding out everything possible about the witness' developmental abilities, personality and life will help the lawyer to see her as a person. This, in turn, will help the advocate to develop a cross-examination style and content that will be the most persuasive to the jury and the least harmful to the child. In the end, whether the child is being manipulated, is misunderstood or is lying, everyone in the courtroom will want to see that child unharmed by the courtroom experience. To the extent that the defense lawyer can do that while still bringing home the message of innocence, it will be a job well-done.